NO. 47153-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND L. CHANNEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF
THE STATE OF WASHINGTON FOR COWLITZ COUNTY
The Honorable Michael Evans, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove each element of the crime of Driving Under the Influence of Intoxicating Liquor or Drugs where there is insufficient evidence that appellant Raymond Channel was under the influence of alcohol at the time he was stopped.

2. A violation of an in limine order by a testifying police officer was an error that deprived Mr. Channel of a fair trial.

3. The trial court erred when it did not suppress Mr. Channel's statements to the arresting officer pursuant to CrR 3.5.

4. The trial court erred when it failed to enter written findings of fact and conclusions of law after conducting the CrR 3.5 hearing.

5. The trial court erred when it declined to give defendant's proposed instruction based on WPIC 6.41.

6. Trial counsel provided ineffective assistance of counsel by failing to propose a limiting instruction regarding Mr. Channel's refusal to take a BAC test and by failing to move for a mistrial after the officer violated the court's in limine order prohibiting testimony that the appellant refused a probable breathalyzer test.

7. The court erred in imposing a sentence on Count I that

exceeds the statutory maximum.

8. The trial court erred by not assessing the appellant's individual financial circumstances and making an individualized inquiry into his current and future ability to pay legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State produced sufficient evidence that Mr. Channel was under the influence of intoxicating liquor or affected by intoxicating liquor at the time of driving his motor vehicle where there were no breathalyzer results, no driving pattern, and where the officer based his contention on three field sobriety tests including walk and turn and one leg stand, where the appellant had had surgery on his pelvis and which affected his ability to perform the tests, and the horizontal gaze nystagmus, which identifies the presence of alcohol but not the level of intoxication? (Assignment of Error 1).

2. Was a mistrial warranted when an officer referenced a "PBT" during his testimony, where the court had adopted the State's agreement to the defense in limine motion prohibiting mention of the appellant's refusal to take a portable breathalyzer test. (Assignment of Error 2).

3. A defendant's custodial statement is only admissible if the defendant was informed of his constitutional rights to remain silent and to

counsel and waived those rights prior to police interrogation. A person is in custody when a reasonable person in his position would believe he or she was in police custody to the degree associated with formal arrest. Where Mr. Channel was stopped and gave his identification and proof of insurance to the officer, did the trial court err in finding that the stop did not rise to the level of a custodial situation and that Mr. Channel's statement to the officer was admissible? (Assignment of Error 3).

4. If an individual unequivocally indicates in any manner and at any time prior to or during questioning that he or she wishes to remain silent, police interrogation must cease. Where Mr. Channel responded that he would "rather not answer" to seven questions in a "DUI arrest interview" administered by the arresting officer, should all Mr. Channel's statements to the officer after his invocation of his right to remain silent be suppressed? (Assignment of Error 3).

5. Whether the trial court erred when it declined to give the appellant's proposed instruction based on WPIC 6.41 where the appellant's alleged statement to the arresting officer that he had had "too much" to drink—which the appellant denied—became a significant part of the evidence in the absence of a breath test? (Assignment of Error 3).

6. Whether the trial court erred when it did not enter written

findings of fact or conclusions of law as required by CrR 3.5? (Assignment of Error 4).

7. Was the appellant denied his constitutional right to effective assistance of counsel when his attorney failed to propose a limiting instruction regarding Mr. Channel's refusal to take a BAC? (Assignment of Error 6).

8. Was the appellant denied effective assistance of counsel by counsel's failure to move for a mistrial after an officer referred to administering a portable breathalyzer test? (Assignment of Error 6).

9. Whether the combined term of confinement and community custody exceeds the five year statutory maximum for the offense under Count I? (Assignment of Error 7).

10. Did the sentencing court err by imposing the legal financial obligations requested by the State without assessing the individual financial circumstances of the appellant and making an individualized inquiry into his current and future ability to pay? (Assignment of Error 8).

C. STATEMENT OF THE CASE

1. Procedural facts:

Appellant Raymond Channel was charged in Cowlitz County Superior

Court with felony driving under the influence of intoxicants in Count 1 of a three–count information. RCW 46.61.502(1)(c). The State alleged in Count 1 that Mr. Channel "did drive a motor vehicle in the State of Washington and was under the influence of or affected by intoxicating liquor" . . . "after having previously been convicted of Vehicular Assault while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.522(1)(b). . . ." Clerk's Papers (CP) 10-12. The State also charged Mr. Channel with First Degree Driving while License Suspended or Revoked (Count 2), and Violation of Ignition Interlock Device Requirement (Count 3). CP 11. RCW 46.20.342(1)(a), RCW 46.20.720 and 46.20.740(1),(2). On December 9, 2014, he entered guilty pleas to Counts 2 and 3. Report of Proceedings (RP) (12/9/14) at 5-12.[1]

The trial court heard a motion to suppress pursuant to CrR 3.5 on December 9, 2014. RP (12/9/14) at 33-54.

After being taken into custody and transported to the Cowlitz County Jail, Mr. Channel was Mirandized and then asked a series of questions in a "DUI Arrest Report" given to him by the arresting officer. On Questions 26,

[1]The record of proceedings is designated as follows: RP – July 17, 2014, July 29, 2014, September 9, 2014, October 7, 2014, October 23, 2014, December 4 , 2014, December 9, 2014 (CrR 3.5 hearing and jury trial), December 10, 2014 (jury trial), and January 6, 2015 (sentencing).

26(a), 26(b), 26(c), 28, and 29, Mr. Channel told the officer that he would "rather not answer." RP (12/9/14) at 40, 41. The court found that Mr. Channel invoked his right to remain silent by responding "rather not answer" regarding the seven questions, but that the remaining statements were voluntary and therefore admissible. RP (12/9/14) at 53, 54. The court also found that although "it's close," Mr. Channel's statements to the officer after being pulled over and asked for his license and insurance were admissible. RP (12/9/14) at 53.

The matter came on for jury trial on December 9 and 10, 2014, the Honorable Michael Evans presiding.

Counsel moved in limine to exclude any reference to Mr. Channel's refusal of a portable breath test. CP 47. The prosecution stated that it would not elicit any information about the portable breath test. RP (12/9/14) at 31. The court noted that the motion was agreed to by the State. The court did not disagree, and thereby adopted the State's position, effectively granting a motion in limine to exclude such evidence. RP (12/9/14) at 31. Counsel also moved to exclude testimony regarding the specific level of intoxication derived from performance of the horizontal gaze nystagmus (HGN) test. RP (12/9/14) at 54-68; CP 46. The court granted the motion prohibiting the State from eliciting testimony about a specific level of

impairment as the result of the HGN. RP (12/9/14) at 68.

Mr. Channel stipulated that he was convicted of violating RCW 46.61.522(1)(b). The statute for vehicular assault while under the influence, which raised the DUI charge to a felony. RP (12/10/14) at 29. A definition of the statute was not provided to the jury. CP 64.

The defense proposed the following instruction regarding out of court statements by Mr. Channel:

> You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

WPIC 6.41 11 *Washington Practice* 196 (West 2008).

The court declined to give the proposed instruction and defense counsel noted his exception. RP (12/10/14) at 39, 41.

The jury found Mr. Channel guilty of felony DUI as charged. RP (12/10/14) at 105; CP 66.

At sentencing, the court calculated an offender score of "8," based on three prior DUI convictions, a conviction for Obstructing in Montana, a conviction for third degree assault (DV), and the conviction for vehicular assault from September, 2012, resulting in a standard range of 51 to 60 months. RP (1/6/15) at 113, 114. The court sentenced Mr. Channel to 60 months for Count 1, 30 days for Count 2, and 30 days for Count 3, and 12

months of community custody. RP (1/6/15) at 120-21; CP 110. Counts 2 and 3 were ordered to be served concurrently, and both to be served consecutively to Count 1, for a total of 61 months. RP (1/6/15) at 121.

Timely notice of appeal was filed on January 12, 2015. CP 83. This appeal follows.

2. Trial testimony:

On July 16, 2014, Officer Timothy Huycke was on patrol in Longview, Washington. RP (12/9/14) at 85. At approximately 11:30 p.m. a pickup truck with a nonworking headlight passed him in the opposite direction. RP (12/9/14) at 86. Officer Huycke turned his vehicle around and activated his emergency lights in order to stop the truck. RP (12/9/14) at 86. After turning around he followed the vehicle for approximately 150 feet. RP (12/9/14) at 86. At that time he noticed that truck also had a tail light that was not working. RP (12/9/14) at 88.

The driver of the truck immediately pulled over to the right and stopped. RP (12/9/14) at 87. Upon contacting the driver, who was identified as Raymond Channel, Officer Huycke noticed that he had the odor of alcohol, had bloodshot and watery eyes, and had slurred speech. RP (12/9/14) at 88-89, 104. When asked how much he had had to drink, the officer testified that Mr. Channel stated "too much." RP (12/9/14) at 89.

Officer Huycke said Mr. Channel was "swaying a little bit and he wasn't walking exactly straight" when he walked from the truck, but that he did not have any difficulty getting out of the truck. RP (12/9/14) at 90, 96.

Mr. Channel performed three field sobriety tests, consisting of the horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg stand tests. RP (12/9/14) at 91, 96, 100. The officer said all six of six "clues" for the HGN test, eight of eight "clues" on the walk-and-turn test, and four of four "clues" on the one-leg stand test were exhibited by Mr. Channel. RP (12/9/14) at 96, 99, 103.

Officer Huycke placed him under arrest for DUI and transported him to the Cowlitz County Jail. RP(12/9/14 at 105. Officer Huycke testified that during the booking procedure, Mr. Channel told him that he had previously had surgery on his pelvis which caused him to limp. RP (12/9/14) at 106. Mr. Channel exercised his right to decline a BAC. RP (12/9/14) at 113.

After his truck was impounded, police found nine unopened cans of Natural Light beer in a 12-pack container in the vehicle. RP (12/10/14) at 28. Mr. Channel testified that he had broken his pelvis in 2009 and that affected his walking and that he had told the officer about the injury during after the one leg stand FST. RP (12/10/14) at 47-49.

Mr. Channel denied that he said that he had had "too much" to drink,

but that he actually said "not too much" when asked by the officer how much alcohol he had consumed that night. RP (12/10/14) at 46. He said that he had had three to four beers earlier in the day. RP (12/10/14) at 44, 46.

Mr. Channel said that he bought a twelve pack of Natural Light beer and had a few beers at a friend's house while doing yard work at 5:30 or 6:00 p.m. that day. RP (12/10/14) at 44. He had been smoking cigarettes while at his friend's house and was suffering from allergies due to a cat at the house, which accounted for the red eyes observed by Officer Huycke. RP (12/10/14) at 45).

During the stop, Officer Ken Hardy arrived at the scene. At trial, when asked what was occurring when he arrived, Officer Hardy testified, "Officer Huycke was talking to the defendant. I believe he was taking a PBT sample . . . ." RP (12/10/14) at 170. Defense counsel voiced an objection to the officer's reference to the PBT, which was sustained, but did not move for a mistrial. RP (12/10/14) at 174.

D. ARGUMENT

1. THE STATE FAILED TO PROVE EACH ELEMENT OF THE CRIME OF DUI WHERE THERE IS INSUFFICIENT EVIDENCE THAT MR. CHANNEL WAS UNDER THE

INFLUENCE OF ALCOHOL.

Mr. Channel's DUI conviction must be reversed because it is not supported by sufficient evidence that he was under the influence of or affected by intoxicating liquor at the time of the collision.

This Court reviews a challenge to the sufficiency of the evidence by analyzing whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State and after drawing all reasonable inferences therefrom. *State v. Perebeynos*, 121 Wn. App. 189, 192-93, 87 P.3d 1216 (2004).

An inference is "a logical deduction or conclusion from an established fact." *Fannin v. Roe*, 62 Wn.2d 239, 242, 382 P.2d 264 (1963). But "[w]hen the inference of a[n] [essential] fact . . . has no evidentiary basis, . . . a jury, may not *speculate* as to the existence of the essential fact—the word 'speculate' being here used in the sense of reaching a conclusion by theorizing upon assumed factual premises outside of and beyond the scope of the evidence." *Brawley v. Esterly*, 267 S.W.2d 655, 659 (Mo. 1954); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

A person is guilty of driving while under the influence of intoxicating

liquor if he drives a vehicle while "under the influence of or affected by intoxicating liquor." RCW 46.61.502(c). A driver is affected by intoxication if his "ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants." *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995). Here, the issue is not whether Mr. Channel consumed alcohol at some time on July 16, 2014; he conceded that he had consumed three to four beers when doing yard work at a friend's house much earlier in the day. The issue is whether, at the time of the traffic stop, his driving was impaired by alcohol. *State v. Hurd*, 5 Wn.2d 308, 316, 105 P.2d 59 (1940).

Here, the evidence does not support a finding that Mr. Channel was under the influence of alcohol at the time of the stop. The record shows Mr. Channel drank three to four beers approximately five hours earlier, between 5:30 p.m. and 6:00 p.m. It is not logical to conclude that Mr. Channel was under the influence of alcohol after consuming three to four beers approximately five hours earlier.

The fact that Mr. Channel had nine unopened 12 ounce cans of Natural Light beer in a 12-pack in his vehicle does not support an inference that he consumed any particular quantity of alcohol when stopped. It neither supports an inference that he consumed more than he acknowledged nor an inference that he was under the influence of the quantity consumed. *See Donaldson v.*

Donaldson, 38 Wn.2d 748, 754, 231 P.2d 607 (1951). At most, the presence of the cans of beer established was the mere opportunity to drink to excess. "Opportunity alone does not rise to the dignity of proof that a defendant actually committed the act. The opportunity to commit a crime is not a substitute for proof of the commission of a crime." *State v. Uglem*, 68 Wn.2d 428, 438, 413 P.2d 643 (1966) (Rosellini, C.J. dissenting).

The odor of intoxicants on Mr. Channel's breath is insufficient evidence that Mr. Channel was driving under the influence, even when considering the evidence in a light most favorable to the State. The evidence showed Mr. Channel drank, at most, three to four beers several hours before driving. It is not logical to infer from the presence of the odor of intoxicants on Mr. Channel's breath that he drank more than the number of beers that he reported to Officer Huycke. The odor the officer detected could be present after consuming the beers several hours earlier, as he reported to the officer. Thus, the combination of the beers that he acknowledged he drank earlier that day, and the odor of intoxicants does not rise to the level of substantial evidence of driving under the influence of alcohol.

The fact that Mr. Channel had nine unopened beer cans is insufficient evidence that he had been driving under the influence of alcohol. The jury could not have reached the conclusion that Mr. Channel was driving under

the influence from this evidence without speculating that he drank more than three or four beers earlier in the day, as he told the officer at the time of the stop.

The only other evidence of Mr. Channel's ability to handle his vehicle is the extremely limited time the officer followed him. The officer did not describe that his driving pattern was suspicious or that he weaved or crossed the center line or fog line, or that he even weaved within his lane of travel. The officer's testimony identifies no suspicious driving pattern whatsoever. Nothing in his driving pattern suggested that Mr. Channel's earlier consumption of alcohol lessened his ability to drive.

Because the evidence does not support a finding that Mr. Channel's driving was affected by alcohol, the State failed to produce sufficient evidence that he was guilty of DUI. Therefore, his DUI conviction must be dismissed.

2. THE OFFICER'S APPARENT VIOLATION OF THE *IN LIMINE* ORDER DEPRIVED MR. CHANNEL OF A FAIR TRIAL AND REQUIRES REVERSAL

Officer Hardy testified that when he arrived at the scene, he thought that Officer Huycke was "taking a PBT sample" from Mr. Channel. Defense counsel objected and the court sustained the objection. RP (12/9/14) at 170-74.

The officer's reference to giving a portable breathalyzer test may have been in violation of the court's in limine order prohibiting reference to Mr. Channel's refusal to take a PBT.

When a witness's remark violates a motion in limine and so prejudices the jury that the defendant is denied the right to a fair trial, a mistrial is warranted. *State v. Escalona,* 49 Wn. App. 251, 254, 742 P.2d 190 (1987). To determine whether such a trial irregularity may have improperly influenced the jury, courts consider: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could have been cured by an instruction to disregard the remark. *Escalona,* 49 Wn. App. at 254 (citing *State v. Weber,* 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

Here, the State argued that the jury would not know what "PBT" meant. RP (12/9/14) at 171. Nevertheless, the court sustained the defense objection.

The comment was more serious and prejudicial to Mr. Channel that it might initially appear. Here, the appellant did not take a PBT—the officer was clearly incorrect in his testimony. Moreover, the mention of a PBT would lead jurors to question why the results of the test were not made part of the trial record. This is compounded by defense counsel's objection to the testimony. The final result is to leave the jury with the impression that a PBT result from the stop exists and that the level of intoxication showed by the PBT was information that the defense wanted to keep from the jury.

In addition, the improper evidence was not cumulative or repetitive. There was no other mention of test results showing a level of impairment. Officer Huycke stated that Mr. Channel had not taken a BAC. RP (12/9/14) at 112-13. The mention of a PBT would cause a jury to speculate that the reason that Mr. Channel did not take a BAC was because he had previously taken a PBT and that the results were incriminating.

Third, a curative instruction could not alleviate the prejudice because of the strong likelihood the jury would necessitate discussion of the PBT—an otherwise inadmissible test—for no reason other than the officer choose to raise the issue of the PBT during his testimony. Even with an explanation, the jury will be left with information that he refused to take not only one, but two tests.

All the relevant facts at issue here rested on the testimony of the accused and the accusers, essentially reducing the trial to a credibility contest. Thus, any evidence suggesting that Mr. Channel was seeking to withhold information from the jury would most certainly weigh heavily against him in the jury's credibility determination. Because the State's evidence turned largely on the credibility of Officer Huycke, a curative instruction would not have helped. *See Wilburn,* 51 Wn. App. at 832. While juries are presumed to follow the court's instructions to disregard testimony,

"no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *Escalona,* 49 Wn. App. at 255 (citing *State v. Miles,* 73 Wn.2d 67, 71, 436 P.2d 198 (1968); *State v. Suleski,* 67 Wn.2d 45, 51, 406 P.2d 613 (1965); *State v. Morsette,* 7 Wn. App. 783, 789, 502 P.2d 1243 (1972)).

Mr. Channel was therefore deprived of his right to a fair trial and a mistrial was warranted. Thus, this court should reverse his conviction.

3. THE TRIAL COURT ERRED WHEN IT FAILED TO SUPPRESS MR. CHANNEL'S STATEMENTS TO OFFICER HUYCKE.

Mr. Channel was in custody for purposes of *Miranda* when Officer Huycke began questioning him after he was initially stopped. An individual has the right to be free from compelled self-incrimination while in police custody. U.S. Const. amend. V; *Miranda v. Arizona,* 384 U.S. 436, 478-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To protect this right, police must inform a person placed under custodial arrest that he has the right to remain silent, that anything he says can be used against him in court, and he has the right to have an attorney present during questioning. *Id.* at 479. *Miranda* safeguards apply as soon as a suspect's freedom of action is restricted to a degree associated with formal arrest. *State v. D.R.,* 84 Wn. App. 832, 836,

930 P.2d 350, *review denied,* 132 Wn. 2d 1015, 943 P.2d 662(1997).

In determining whether an individual was in custody, the reviewing court uses an objective standard: whether a reasonable person in the suspect's position would believe he was in police custody to the degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Courts must indulge every reasonable presumption against waiver of constitutional rights. *State v. Riley,* 19 Wn. App. 289, 294, 576 P.2d 1311 (1978). An appellate court reviews a trial court's determination of a custodial interrogation de novo. *State v. Solomon*, 114 Wn. App. 781, 788-89, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025, 72 P.3d 763 (2003).

Whether a defendant is in custody for *Miranda* purposes is a very fact-dependent inquiry. Here, Mr. Channel was stopped by Officer Huycke because of a non-working headlight. The officer obtained his Washington Identification card and proof of insurance. RP (12/9/14) at 88. The act of holding his identification and proof of insurance, essentially keeping Mr. Channel from legally leaving the scene, may constitute such a restriction of movement that a reasonable person in the suspect's position would believe he was in police custody at that time. The officer asked Mr. Channel how much he had had to drink that night, a question clearly designed to elicit an

incriminating response. RP (12/9/14) at 88. According to the officer, Mr. Channel responded, "too much." RP (12/9/14) at 89.

Officer Huycke continued to ask Mr. Channel to take actions to incriminate himself when he asked Mr. Channel if he would take sobriety tests. RP (12/9/14) at 90. Based on this series of events, a reasonable person in Mr. Channel's position would have felt his movement was restricted to the level of a custodial arrest.

The appellant submits that Officer Huycke should have read Mr. Channel his *Miranda* warnings as soon as he began questioning him. Because Mr. Channel was in custody when the officer was questioning him after receiving his identification and proof of insurance, thus preventing him from leaving the scene without his documentation, Mr. Channel's pre-*Miranda* statements should have been suppressed.

In addition, some statements made by Mr. Channel after Officer Huycke administered *Miranda* warnings were inadmissible because Mr. Channel invoked his right to remain silent after answering Question 26 in the DUI Arrest Report, to which he responded that he would "rather not answer." Despite this, the officer continued to ask him questions, and he gave the same response for Questions 26(A) through 26(c), 27, 28 and 29. RP (12/9/14) at 41.

If an individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, police interrogation must cease. *Miranda,* 384 U.S. at 473-74. Once a person has shown that he intends to exercise his Fifth Amendment privilege, "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id.* at 474. Where a suspect has received *Miranda* warnings, the invocation of the right to remain silent must be clear and unequivocal in order to be effectual. *State v. Walker*, 129 Wn. App. 258, 276, 118 P.3d 935 (2005).

After Officer Huycke read Mr. Channel his *Miranda* rights and the waiver portion of the constitutional rights form, Mr. Channel unequivocally invoked his right to remain silent when he responded that he would "rather not answer." RP (12/9/14) at 41. Despite his invocation of his right to remain silent, Officer Huycke continued to ask a series of questions designed to incriminate Mr. Channel. Because Mr. Channel invoked his right to remain silent with Officer Huycke, all statements made after his invocation were inadmissible.

Where a defendant's statements are admitted in violation of *Miranda,* the State must prove beyond a reasonable doubt the admission did not contribute to the court's guilty finding. *State v. Sergent,* 27 Wn. App. 947,

951-52, 621 P.2d 209 (1980), *review denied*, 95 Wn.2d 1010(1981). An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the outcome of the trial would have been different if the error had not occurred. *Id.*

The critical issue in this case is whether Mr. Channel was under the influence of alcohol at the time he was driving. Beyond his statements, there was little evidence of his intoxication. Odor of intoxicants and bloodshot, watery eyes are evidence of consumption of alcohol, but not conclusive evidence of legal intoxication. The portable breath test is not admissible at trial to show intoxication and the HGN test is admissible only to show consumption of alcohol, not intoxication. *State v. Baity,* 140 Wn.2d 1, 17-18, 991 P.2d 1151 (2000); *State v. Smith,* 130 Wn.2d 215, 221-22, 922 P.2d 811 (1996). Without Mr. Channel's incriminating statements, the trial court may not have been convinced beyond a reasonable doubt that he was under the influence of alcohol. Therefore, Mr. Channel's conviction for DUI should be reversed.

4. **THE TRIAL COURT ERRED WHEN IT NEGLECTED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A CrR 3.5 HEARING.**

The trial court failed to enter written findings of fact and conclusions

of law after conducting a CrR 3.5 hearing as required by CrR 3.5(c). This was significant in this case because the defendant testified at the CrR 3.5 hearing and denied that he was under the influence, gave reasons why the officer thought he did not perform well on the field sobriety tests, and denied the officer's assertion that he said that he had had "too much" to drink.

CrR 3.5 (c) states:

> "(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor."

These findings should have been entered before the trial began or before it reached its conclusion. Especially since the defendant was proposing WPIC 6.41 regarding his out of court statements. Also, the trial court noted that the question of whether he was in custody when initially stopped was "close." RP (12/9/14) at 46-47.

According to *State v. Trout,* 125 Wn.App. 403, 105 P.3d 69, *review denied,* 155 Wn. 2d 1005 (2005):

> "The criminal rules require that at the end of a "3.5 hearing" (admissibility of statement) the trial judge must set forth in writing, "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c)." id. at 414-15.

This error is harmless provided that the trial court's opinion "is clear and comprehensive." *Id.* at 415. That was not the case at bench where the court alluded that the decisions regarding the initial statement was "close," and where it is unclear which specific questions were not answered when he was questioned at the Cowlitz County Jail. Entry of the CrR 3.5 findings was a critical stage of the proceedings that was omitted by the trial court.

5. THE TRIAL COURT ERRED WHEN IT DECLINED TO GIVE MR. CHANNEL'S PROPOSED INSTRUCTION.

Defense counsel requested the following inclusion pursuant to WPIC 6.41:

> You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

CP 44.

The court, however, declined to give the instruction. Mr. Channel was severely prejudiced when WPIC 6.41 was rejected by the trial court. The State offered Mr. Channel's incriminating statements during the trial, including a statement that he had had "too much" to drink. Mr. Channel was prejudiced by the refusal of the trial court to allow argument to the jury that they could give such weight and credibility to any alleged out-of-court statements by Mr. Channel. The defense should have been able to counter the

State's arguments concerning Mr. Channel's alleged admissions during closing argument rather than just a blanket denial that the officer had merely misheard him and that Mr. Channel had said "not too much" instead of "too much" in response to the officer's questioning. RP (12/10/14) at 83. Also, the jury should at least have been enabled to take into consideration the surrounding circumstances of the statements; *i.e*, the alleged admission having been uttered before Officer Huycke read Mr. Channel the *Miranda* warnings. RP (12/9/14) at 46-47, 92.

6. MR. CHANNEL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Under the Sixth Amendment to the U.S. Constitution, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Claims of ineffective assistance of counsel are reviewed *de novo*. *State v. Grier,* 150 Wn. App. 619, 633, 208 P.3d 1221 (2009). "To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Turner,* 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient

representation. *State v. McFarland,* 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Although apparently unreasonable decisions can be excused on tactical grounds, where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel's performance, such performance falls "below an objective standard of reasonableness" and is deficient. *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal,* 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson,* 129 Wn.2d 61,77-78, 917 P.2d 563 (1996).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett,* 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson,* 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003), *citing Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id., citing Strickland,* 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v.Cienfuegos,* 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

a. Counsel was ineffective by failing to propose a limiting instruction regarding Mr. Channel's refusal to take a BAC.

Defense counsel rendered ineffective assistance by failing to request and propose a limiting instruction on the BAC refusal evidence. "A party who fails to ask for a limiting instruction waives any argument on appeal

that the trial court should have given the instruction." *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16, 30 (2007).

Here, trial counsel did not request or propose a limiting instruction on the BAC refusal. Whether or not Mr. Channel was under the influence of alcohol at was the sole issue on the DUI charge. The fact that BAC refusals ordinarily can be used to infer guilt of DUI demonstrates how important such a limiting instruction would have been.

There was no legitimate tactical reason for trial counsel's failure to seek a limiting instruction. He was prejudiced by this deficient performance because, had counsel requested the instruction, if is likely that he would have received it. Given the paucity of evidence presented, it is likely that the jury would have acquitted Mr. Channel of DUI.

As argued above, the only significant evidence as to this element comes from evidence that Mr. Channel drank up three to four beers approximately five hours before the traffic stop at 11:30. Without the limiting instruction, the jury was allowed to use the BAC refusal evidence to bolster the lack of evidence that he was intoxicated at the time of the stop. This is more than enough prejudice to undermine confidence in the jury's verdict. *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703

(2009).

b. Counsel was ineffective by failing to move for mistrial.

Counsel's failure to move for a mistrial after a State's witness testified regarding a portable breathalyzer test, in apparent violation of the motion in limine, could not be reasonably characterized as tactical. Given the nature of the statement and the lack of evidence presented by the State on the issue of intoxication, there was no strategic reason not to seek a mistrial. Counsel could and should have moved for a mistrial outside the presence of the jury so as not to call more attention to the prejudicial testimony. If the court denied the motion, Mr. Channel would have lost nothing but would have preserved a meritorious claim for appeal.

Accordingly, Mr. Channel's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution were violated. Therefore, his DUI conviction must be reversed and the case remanded for a new trial.

7. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY ON COUNT I EXCEEDS THE STATUTORY MAXIMUM.

The court sentenced Mr. Channel to 60 months confinement for the

felony DUI conviction under Count I. CP 75. The court also imposed a 12 month term of community custody on count I. CP 76; *see* RCW 9.94A.701(3)(a) (one year term of community custody for any crime against persons under RCW 9.94A.411(2)); RCW 9.94A.411(2) (felony DUI counts as a "crime against a person"). The combined term of confinement and community custody in Count 1 equals 72 months and therefore exceeds the five year (60 months) statutory maximum for the offense.

"[A] court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5). Felony DUI is a class C felony. RCW 46.61.502(6). The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c). The combined term of confinement (60 months) and community custody (12 months) exceeds the five year (60 month) statutory maximum for the felony DUI conviction under count I. CP 75-76.

RCW 9.94A.701(9) provides "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as

provided in RCW 9A.20.021."

Mr. Channel's case must be remanded for resentencing to either amend the community custody term or resentence Mr. Channel on Count I consistent with RCW 9.94A.701(9). *Boyd,* 174 Wn.2d at 473.

8. THE TRIAL COURT FAILED TO TAKE INTO ACCOUNT MR. CHANNEL'S FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

At sentencing, the court ordered Mr. Channel to pay legal costs. CP 77-78. The record contains no finding, either oral or written, stating that the trial court considered Mr. Channel's financial circumstances and found that he has the ability or likely future ability to pay the LFOs ordered in the Judgment.

Mr. Channel did not object to the trial court's failure to make any findings of ability to pay, or to the trial court's imposition of discretionary LFOs. However, our Supreme Court recently chose to review an objection to the imposition of LFO's raised for the first time on appeal, In *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court held that RAP 2.5(a) provides appellate courts with discretion whether to review a defendant's LFO challenge raised for the first time on appeal. *Blazina,* 344 P.3d at 683. There, the *Blazina* court exercised its discretion in favor of

allowing the LFO challenge. *Id.*

In this case, the sentencing court failed to make any individualized inquiry into his present or future ability to pay. Factors to be considered in determining whether a person has a present or future ability to pay include the length of incarceration and whether the court has previously made an indigency determination.

The State did not provide evidence establishing Mr. Channel's ability to pay, nor did it ask the court to make a determination under RCW 10.01.160, when it asked that LFOs be imposed. Moreover, the trial court made no further inquiry into Mr. Channel's financial resources, debts, or employability. There was no specific evidence before the trial court regarding his past employment or his future educational opportunities or employment prospects. "The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina,* 344 P.3d at 685. The record in this case fails to establish that the trial court made an "individualized inquiry" into his ability to pay, or actually took into account his financial circumstances before imposing LFOs. The trial court therefore did not comply with the LFO statute.

In *Blazina*, the Supreme Court held that because the sentencing judge failed to make a proper inquiry into the defendant's ability to pay, the case

should be remanded to the trial court for a new sentencing hearing. *Blazina*, 344 P.3d at 685. Similarly, this Court should vacate the LFO portion of Mr. Channel's Judgment and remand for resentencing on this issue.

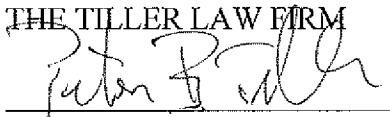
E. CONCLUSION

For the foregoing reasons, Raymond Channel respectfully requests that the Court reverse his conviction.

Alternatively, because the record fails to establish that the trial court did in fact consider his ability to pay before imposing discretionary LFOs, this case should be remanded for resentencing.

DATED: July 29, 2015.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Raymond Channel

CERTIFICATE OF SERVICE

The undersigned certifies that on July 29, 2015, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 29, 2015.

PETER B. TILLER

APPENDIX A

RCW 46.61.502

Driving under the influence.

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

(3)(a) It is an affirmative defense to a violation of subsection (1)(a) of this section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(b) It is an affirmative defense to a violation of subsection (1)(b) of this

section, which the defendant must prove by a preponderance of the evidence, that the defendant consumed a sufficient quantity of marijuana after the time of driving and before the administration of an analysis of the person's blood to cause the defendant's THC concentration to be 5.00 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4)(a) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(c) or (d) of this section.

(b) Analyses of blood samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had a THC concentration of 5.00 or more in violation of subsection (1)(b) of this section, and in any case in which the analysis shows a THC concentration above 0.00 may be used as evidence that a person was under the influence of or affected by marijuana in violation of subsection (1)(c) or (d) of this section.

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:

(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or

(b) The person has ever previously been convicted of:

(i) Vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a);

(ii) Vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b);

(iii) An out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection; or

(iv) A violation of this subsection (6) or RCW 46.61.504(6).

RCW 46.61.522

Vehicular assault — Penalty.

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

(2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

RCW 46.20.308

Implied consent—Test refusal—Procedures.

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration, THC concentration, or presence of any drug in his or her breath if arrested for any offense where, at the time

of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol or THC in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. The officer shall inform the person of his or her right to refuse the breath test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if:

(i) The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver's breath is 0.08 or more or that the THC concentration of the driver's blood is 5.00 or more; or

(ii) The driver is under age twenty-one and the test indicates either that the alcohol concentration of the driver's breath is 0.02 or more or that the THC concentration of the driver's blood is above 0.00; or

(iii) The driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of felony driving under the influence of intoxicating liquor or drugs

under RCW 46.61.502(6), felony physical control of a motor vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6), vehicular homicide as provided in RCW 46.61.520, or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist.

(4) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath, no test shall be given except as authorized by a search warrant.

(5) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more, or the THC concentration of the person's blood is 5.00 or more, if the person is age twenty-one or over, or that the alcohol concentration of the person's breath or blood is 0.02 or more, or the THC concentration of the person's blood is above 0.00, if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (6) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (7) of this section and that the person waives the right to a hearing if he or she receives an ignition interlock driver's license;

(c) Serve notice in writing that the license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a

hearing pursuant to subsection (7) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(d) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol or THC concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more, or the THC concentration of the person's blood was 5.00 or more, if the person is age twenty-one or over, or that the alcohol concentration of the person's breath or blood was 0.02 or more, or the THC concentration of the person's blood was above 0.00, if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(6) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (5)(d) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (7) of this section, whichever occurs first.

(7) A person receiving notification under subsection (5)(b) of this section may, within twenty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of three hundred seventy-five dollars as part of the request. If the request is mailed, it must be postmarked within twenty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required three hundred seventy-five dollar fee, the department shall afford the person an opportunity for a hearing. The

department may waive the required three hundred seventy-five dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (5) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more, or THC in his or her system in a concentration above 0.00, if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more, or the THC concentration of the person's blood was 5.00 or more, if the person was age twenty-one or over at the time of the arrest, or that the alcohol concentration of the person's breath or blood was 0.02 or more, or the THC concentration of the person's blood was above 0.00, if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within

this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more, or THC in his or her system in a concentration above 0.00, and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(8) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That

were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(9)(a) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (6) of this section, other than as a result of a breath test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (6) of this section, or notifies the department of licensing of the intent to seek such a deferred prosecution, then the license suspension or revocation shall be stayed pending entry of the deferred prosecution. The stay shall not be longer than one hundred fifty days after the date charges are filed, or two years after the date of the arrest, whichever time period is shorter. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license under subsection (5) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

(b) A suspension, revocation, or denial imposed under this section, other than as a result of a breath test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is

completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(c) The provisions of (b) of this subsection relating to a stay of a suspension, revocation, or denial and the cancellation of any suspension, revocation, or denial do not apply to the suspension, revocation, denial, or disqualification of a person's commercial driver's license or privilege to operate a commercial motor vehicle.

(10) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

TILLER LAW OFFICE

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Transmittal Letter

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